

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

**DATE:** October 14, 1998

**TO:** Michael Dunn, Regional Director, Region 16

**FROM:** Barry J. Kearney, Associate General Counsel, Division of Advice

**SUBJECT:** American Light, Inc. and Design Electric Co., Case 16-CA-19314

512-8320-5077, 524-5012-6100, 524-8393-5027

This case was submitted for advice on whether Employer American Light (American) lawfully evicted from its premises, and Employer Design Electric (Design) thereafter lawfully refused to consider for hire, two union organizers because, while they were applying for positions with the Employer, they attempted to solicit another job applicant for union membership in violation of the Employer's no-solicitation policy.

American sells and Design installs electrical fixtures. American and Design are located across the street from one another, have the same owners, stockholders, labor relations director and labor relations policy. <sup>(1)</sup> Three union organizers, Cavazos, Gafford, and Lockwood, arrived at the Employer's Job Fair and parked their truck in front of the Employer's business. In the rear of the truck, the organizers displayed a 4' by 8' sign reading "Electricians Wanted: \$22.78 per hour to qualified applicants. [Street Address] Join the Union now." The organizers then entered the Employer's business and completed job applications on which they indicated their Union affiliation.

Lockwood went into the back office for an interview. While waiting in the lobby, Cavazos and Gafford approached another applicant. Cavazos asked the applicant if he had ever considered joining the Union; Gafford outlined the benefits of being in the Union. The Employer's operations manager was also in the lobby and overheard this conversation. He told the organizers that the Employer's attorney said that they could not talk about the Union in his building. Gafford nevertheless openly persisted in asking the other applicant about joining the Union. The manager then stated that he was going to have Gafford ejected. Gafford retorted that it was a free country and he could ask the other applicant to join the Union. At that point, another manager was summoned and threatened to call the authorities if Gafford and Cavazos did not leave. At this point, Cavazos and Gafford finally left.

Ten minutes later, Cavazos returned and asked the manager if he and Gafford were still eligible for employment. The Employer replied that they were not eligible because they had violated company policy. Shortly thereafter, Lockwood finished his interview and asked about the other two organizers. He was informed that they had been evicted for violating the no-solicitation policy. <sup>(2)</sup>

The Employer provided a copy of its policy as follows:

In an effort to assure a productive and harmonious work environment, persons not employed by the company are prohibited from soliciting or distributing literature in the workplace.

The Company recognizes that employees may have interests in events and organizations outside the workplace. However, employees must not solicit or distribute literature concerning these activities during working time. (Working time does not include lunch periods or any other periods in which employees are not on duty.)

The instant charge alleges that the Employer unlawfully evicted from its premises, and refused to consider for employment, the two organizers Cavazos and Gafford.

We conclude, in agreement with the Region, that the Employer lawfully evicted the organizers and lawfully refused to consider them for employment.

First, we note that the Employer had a no-solicitation policy that is lawful on its face,<sup>(3)</sup> and there is no evidence that this policy was disparately enforced against union solicitations in general or against the instant solicitation in particular.<sup>(4)</sup> We therefore conclude that the Employer lawfully evicted the union organizers, as "persons not employed by the company", for violating that policy. In that regard, we note that Gafford persisted in flouting the policy even after the Employer initially warned him to cease his solicitation.

We next conclude that the Employer lawfully refused to consider Cavazos and Gafford for employment for the same reason, viz., for having violated the no-solicitation policy. In this regard, we do not rely on the organizers' allegedly disloyal or unprotected conduct in attempting to solicit applicants away from the Employer's Job Fair. The Employer manager relied upon only the organizers' solicitation activity as nonemployees; there is no evidence that the manager relied upon, or was even aware of, the fact that the organizers' truck was parked outside with a sign at tempting to solicit job applicants away to a Union address. Thus, the instant disposition rests upon the Employer's lawful application of its no-solicitation policy against the organizers' open solicitations.

B.J.K.

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<sup>1</sup> Counsel for American and Design advised the Region that, for the purposes of this case, the companies are joint employers.

<sup>2</sup> The Employer apparently taped a copy of this policy to the window after the organizers initially appeared. It appears, however, that this was a long standing no-solicitation policy of the Employer.

<sup>3</sup> See *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1955); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

<sup>4</sup> Cf. *Emery Realty, Inc. v. NLRB*, 863 F.2d 1259, 1263 (6th Cir. 1988), enfg. 286 NLRB 372 (1987); *Davis Supermarkets*, 306 NLRB 426, 427 (1992), enfd. 2 F.3d 1162 (D.C. 1993).